Filed 9/30/03 In re Justin H. CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

In re JUSTIN H., a Person Coming Under the Juvenile Court Law.	
SHASTA COUNTY DEPARTMENT OF SOCIAL SERVICES, Plaintiff and Respondent, v. CLIFTON H. et al., Defendants and Appellants.	C043422 (Super. Ct. No. 2314602)

Clifton H. and Kristan C. (appellants), the parents of Justin H. (the minor), appeal from orders of the juvenile court terminating parental rights and freeing the minor for adoption. (Welf. & Inst. Code, § 366.26; further section references are to this code unless otherwise specified.) Appellants contend the failure of the court and the Department of Social Services (DSS) to comply with the notice provisions of the Indian Child Welfare Act (ICWA) (25 U.S.C. 1901 et seq.) requires reversal. We agree

but reject appellants' contention that the juvenile court's orders are void.

FACTS

In January 2001, DSS filed a petition alleging the newborn minor was at risk due to parental substance abuse. The minor was not detained.

Upon inquiry, it appeared that the minor has possible Indian heritage from both maternal and paternal ancestors in the Cherokee, Apache, Choctaw, and Blackfeet tribes. In March 2001, DSS sent inquiries to the Fort Sill Apache Tribe, the Cherokee Nation of Oklahoma, the Blackfeet Tribe, and the Choctaw Nation of Oklahoma on the status of the minor as an Indian child.

The Fort Sill Apache Tribe, the Blackfeet Tribe, and the Choctaw Nation of Oklahoma replied that the minor was not eligible for membership in their tribes. The Cherokee Nation of Oklahoma asked for additional information on the minor's ancestors and, when they received no response from DSS, removed the request for information from their active files.

Appellants failed to correct the problems that led to court intervention. Consequently, DSS filed a subsequent petition in September 2001, and the minor was removed from parental custody in February 2002. Thereafter, appellants failed to reunify and, in October 2002, the court terminated services and set a section 366.26 hearing. At the hearing in February 2003, the court terminated parental rights, selecting adoption as the appropriate permanent plan.

DISCUSSION

Appellants contend, and DSS concedes, there is no evidence in the record that notice of the proceedings and of the right to intervene was given to all the appropriate Indian entities and, thus, there was no determination of whether ICWA applied.

ICWA protects the interests of Indian children and promotes the stability and security of Indian tribes by establishing minimum standards for, and permitting tribal participation in, dependency actions. (25 U.S.C. §§ 1901, 1902, 1903(1), 1911(c), 1912.) The juvenile court and DSS have an affirmative duty to inquire at the outset of the proceedings whether a child who is subject to the proceedings is, or may be, an Indian child. (Cal. Rules of Court, rule 1439(d).) If, after the petition is filed, the court "knows or has reason to know that an Indian child is involved," notice of the pending proceeding and the right to intervene must be sent to the tribe or the Bureau of Indian Affairs (BIA) if the tribal affiliation is not known. (25 U.S.C. § 1912; Cal. Rules of Court, rule 1439(f).) As conceded by DSS, failure to comply with the notice provisions and to determine whether ICWA applies is prejudicial error. (*In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1424; *In re Desiree F.* (2000) 83 Cal.App.4th 460, 472.)

Here, DSS provided notice to at least one entity in each of the tribal affiliations identified by appellants. But there are at least six other Apache entities as well as additional Cherokee and Choctaw entities listed in the Federal Register of recognized Indian entities, none of whom were noticed by DSS. (67 Fed.Reg.

46328 (July 12, 2002).) And DSS made no effort to provide the additional information sought by the Cherokee Nation of Oklahoma.

Consequently, we must reverse the judgment and remand the matter to the juvenile court for compliance with ICWA's notice requirements.

Appellants claim that orders made by the juvenile court prior to compliance with ICWA notice are void. We disagree. No one appealed the removal, placement, and service plan orders on the ground that DSS failed to notice all the tribes or that other ICWA requirements were not met. Those orders are now final. While compliance with the provisions of ICWA cannot be waived (*In re Marinna J.* (2001) 90 Cal.App.4th 731, 739), the remedy for failure to comply is a petition to invalidate (25 U.S.C. 1914). The petition may be brought by the Indian child, his or her parent, or the Indian tribe. (25 U.S.C. 1914.) Invalidation may be ordered if compliance with the notice, placement, waiting periods, and evidentiary requirements of ICWA has not occurred. (25 U.S.C. 1914.) However, this invalidation process means that the orders are not void, but merely voidable at the election of the tribe or other petitioning party. (See *In re Desiree F., supra,* 83 Cal.App.4th at pp. 475-476.) More importantly, until the juvenile court has determined whether ICWA applies and has found, based upon tribal response or other evidence, that the minor is an Indian child, the invalidation procedure does not apply. (25 U.S.C. 1914.)

DISPOSITION

The orders terminating parental rights and selecting adoption as the permanent plan are reversed, and the matter is remanded to the juvenile court for the limited purpose of compliance with the notice provisions of ICWA and a determination whether ICWA applies in this case. Where notice was not given or full information was not provided to the tribes, the juvenile court shall order DSS to comply promptly with the notice provisions of ICWA. Thereafter, if there is no response or if the tribes or the BIA determine the minor is not an Indian child, the orders shall be reinstated. If, on the other hand, the tribes or the BIA determine the minor is an Indian child or if information is presented to the juvenile court that affirmatively indicates the minor is an Indian child as defined by ICWA and the court determines ICWA applies to this case, the court is directed to conduct a new section 366.26 hearing in conformance with all provisions of ICWA.

SCOTLAND, P.J.

We concur:

HULL, J.

ROBIE, J.